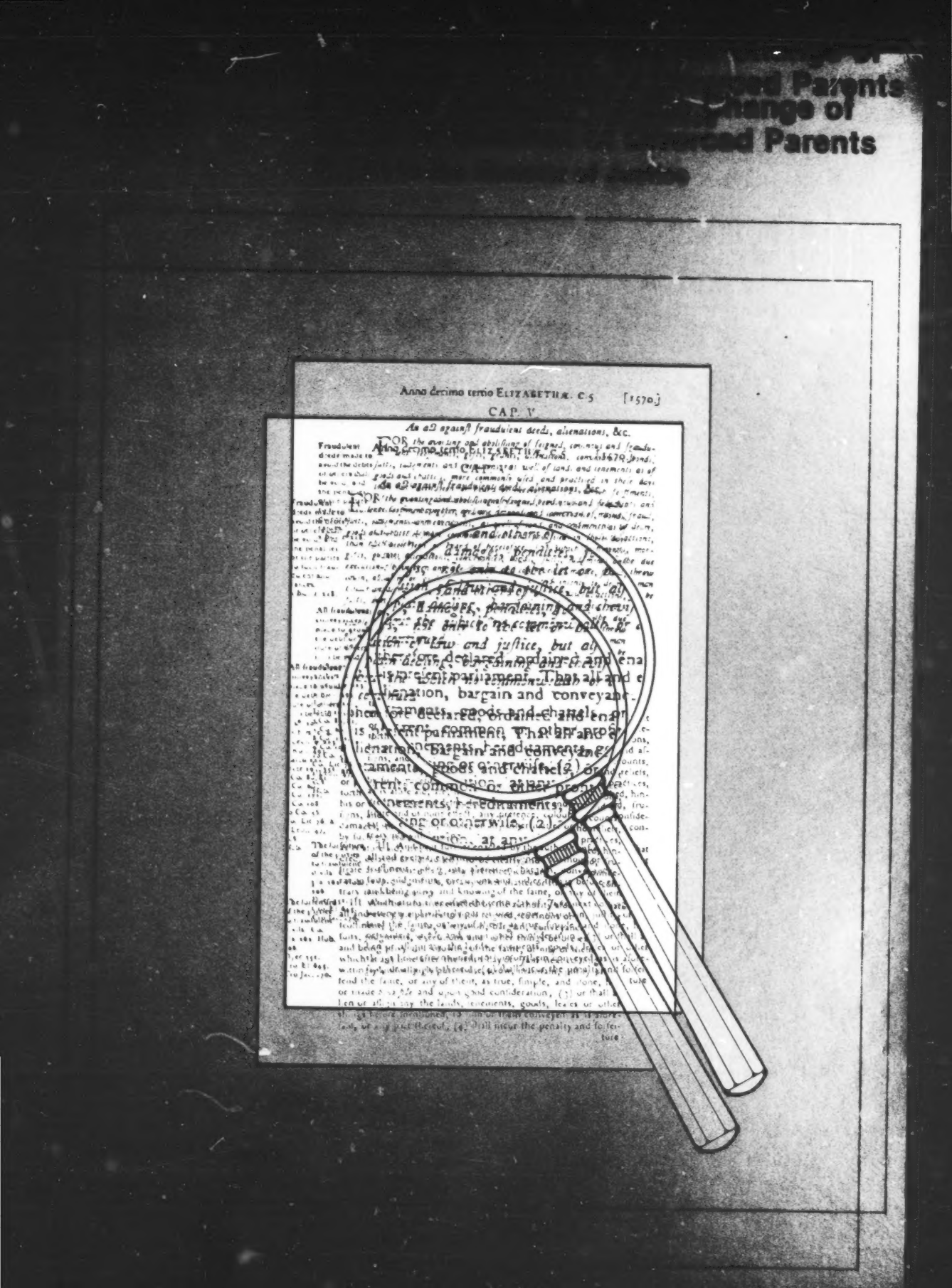
Anno decimo tertio ELIZABETHÆ. c. 5 [1570]
CAP. V
An act against fraudulent deeds, alienations, &c.
FOR the avoiding and abolishing of feigned, covinous and fraudulent
Fraudulent deeds made to
and others of
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bargain and conveyance
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85-5256/

PROPOSALS RELATING TO THE CHANGE OF NAME OF CHILDREN OF DIVORCED PARENTS

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Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

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Report to the Minister of Justice

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March, 1985

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The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

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The Commissioners are:

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Madam Justice MARJORIE A. GERWING

Mr. GORDON J. KUSKI, Q.C., LL.B.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., LL.B., M.A., and Mr. C. Peter Thagard, LL.B. are the Legal Research Officers, and Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting and Mrs. Sandy Antonini-Ready, LL.B. are Legal Research Officers under contract. The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

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The Law Reform Commission Act. * * * *

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

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The Honourable J. Gary Lane, Q.C.
Minister of Justice
Province of Saskatchewan
REGINA, Saskatchewan

The Honourable J. Gary Lane, Q.C.
Minister of Justice
Province of Saskatchewan
REGINA, Saskatchewan

Dear Mr. Minister:

The Commission has completed an examination of a provision of the Change of Name Act which has the effect of denying a non-custodial divorced parent the right to be consulted upon an application for change of name of his or her child. The Change of Name Act which has the effect of denying a non-custodial divorced parent the right to be consulted upon an application for change of name of his or her child. When this provision was first adopted in 1947, it may have been less objectional than at present. Contemporary custody law places emphasis on maintaining relationships between a child and both parents whenever possible. The Act conflicts with that goal. It is also of note that no other province has a similar provision.

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The Commission undertook this project in response to comments from members of the public whose personal experience led them to conclude that the existing legislation unfairly both to the non-custodial parent and to the child. Pursuant to section 9 of the Law Reform Commission Act, the Commission submits this its report recommending amendment of The Change of Name Act.

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Respectfully submitted this 15th day of March, A.D. 1985.

Douglas A. Schmeiser, Q.C.,
Chairman

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Madam Justice Marjorie A. Gerwing, Commissioner

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PROPOSALS RELATING TO THE CHANGE OF NAME OF CHILDREN OF DIVORCED PARENTS

PROPOSALS RELATING TO THE CHANGE OF NAME OF CHILDREN OF DIVORCED PARENTS

I. THE PROBLEM

In 1975, a new *Change of Name Act*[1] was adopted in Saskatchewan. Some provisions were retained from earlier legislation, including s. 6 of the present Act, which provides, in part:

> 6.(1)Where a person mentioned in subsection 4(1) is the parent of an unmarried infant child of whom he has lawful custody and where that child has a surname other than his surname, the person may apply for the surname of the child to be changed to his surname.
>
> (2)Where a married person makes an application under subsection (1), the application shall be accompanied by the consent of his spouse.

A mother with custody of her child who uses her maiden name or adopts the name of a new husband may change the child's name. Consent of the child's father will be required only if the mother is still married to him. This report is concerned with the loss of the father's right to be consulted upon a change of his child's name after divorce.

Change of name in Saskatchewan is largely an administrative matter. The procedure ordinarily only requires completion of a form and payment of a small fee to the Director of Vital Statistics. The Director simply records the change in the public record when the formalities have been complied with. Therefore, questions about the relationship between the father and the child cannot be raised; it is immaterial whether the father supports the child or has retained close contact with it. The child's wishes are relevant under the Act only if he or she is older than 14.[2]

This state of affairs has been criticized on more than one occasion. The Commission undertook an examination of the issue because of publicity surrounding a recent case in which a divorced father took his complaint to the press.[3] But the fairness of the provision was also questioned in the Legislature after the matter had been raised on several occasions.[4] This Commission undertook to examine the matter because of public concern and a resolution passed by the Legislature. The Commission has attempted to determine whether s. 6 of the Act has any legitimate justification. For reasons which will be outlined in this report, the Commission has concluded that the section is contrary to basic principles governing the parent-child relationship.

[1] *See now R.S.S. 1978, c. C-6.*

[2] *Section 11.*

[3] *See Jenni Mortin, "Law Reform Commission to Review Name Changes", Saskatoon Star-Phoenix,* April 23, 1983, A-3.

[4] Sask. Legislature, Debates and Proceedings, 2nd Session of the 18th Legislature, v. xvii, pp. 1034-1036.

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II. BACKGROUND

At common law, an adult could change his own name by deed poll — in effect, a public declaration of name change.[5] The authority to change a child's name rested with the guardian of the child, who could resort to a deed poll for that purpose.[6] Change of name legislation in Saskatchewan is essentially a modernization of the common law. Registration of a name change with the Director of Vital Statistics and publication of notice of the changes in the Official Gazette have replaced the deed poll, and have much the same purpose.

Since at common law the father was guardian of his infant children, authority to change a child's name rested with him alone. Not even a custody order in favour of the mother disturbed that authority, since custody is confined to care and control of the child.[7] In 1925, however, the Saskatchewan *Infants Act* was amended to recognize both parents as guardians of their infant children in the absence of court order or agreement to the countrary.[8] After the amendment, the consent of both parents was required to change the name of a child.

There are obvious cases in which a custodial parent should be able to change the name of a child against the wishes of the other parent. For example, a father who abandons his family, severing contact with it entirely should lose his right to prevent a change of name to that of the mother's new family. It was likely for these reasons that the *Change of Name Act* was amended in 1946 to allow a mother to change the names of her children to that of her new husband without the father's consent.[9] It may have been easy to assume in Saskatchewan in 1946 that the stepfather would be the real parental figure in the child's life.

In 1947, the rule established in the previous year was extended to permit a name change by any parent with custody following divorce or dissolution of marriage.[10] It is likely that the amendment was not carefully considered, especially since it seems merely to have extended an already established rule. In any event, when the provision was questioned in debate when the Act was redrawn in 1975, the Minister responsible could provide no ready explanation for it.[11]

As a result of the 1946-47 amendments, Saskatchewan was placed in a unique position. In no other Canadian jurisdiction can a parent change the name of a child without consent of the other parent or without court order dispensing with consent.[12]

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[5] 21 Halsbury's Laws of England (3rd ed.), 352. In fact, no formality was strictly required, but Halsbury reports that "in order to preserve testimony and obviate doubt . . . it is usual to adopt one of three courses . . . private Act of Parliament . . . Royal Licence . . . or to execute a deed poll." The last was the common practice.

[6] *Re T.* [1962] 3 All E.R. 100 discusses the common law position.

[7] *Hewer v. Bryant* [1969] 3 All E.R. 578, per Lord Sachs.

[8] S.S. 1925-26, c. 42, now R.S.S. 1978, c. I-15, s. 22(1).

[9] S.S. 1946, c. 104.

[10] S.S. 1947, c. 113, s. 6(1).

[11] *Supra*, note 4.

[12] *The Change of Name Act*, R.S.O. 1980, c. 62, The *Change of Name Act*, S.N.S., 1977, c. 6, *The Change of Name Act*, R.S.A. 1980, c. – 4, *Name Act*, R.S.B.C. 1979, c. 295, the *Change of Name Act*, R.S.N.B. 1973, c. – 2, The *Change of Name Act*, S.N. 1978, c. – 2, *The Change of Name Act*, S.M. 1971, c. 69, *The Change of Name Act*, R.S.P.E.I. 1974, c. – 3.

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III. NAME CHANGE AND THE WELFARE DOCTRINE

In Canada and other common law jurisdictions, the basic legal principle governing the parent-child relationship is that the state (through the courts) has an obligation to protect the interests of children.[13] It has long been the settled law that in a dispute between parents over custody, the child's welfare is the paramount consideration.[14] The *parens patriae* doctrine is not, however, confined to custody disputes. In any dispute between parents involving a child, it is the child's needs and interests which should be considered, not the convenience or wishes of the parents unless they coincide with the child's interests.

Section 6 of the *The Change of Name Act* treats authority to change the name of the infants following divorce as an incident of custody. When the court has awarded custody to a parent, the other parent's right in regard to change of name is simply abolished. No doubt, it is desirable that the custodial parent has primary responsibility for the discipline and upbringing of the child. However, unrestricted authority to change a child's name may be used to frustrate meaningful contact between the child and the non-custodial parent.

Access or visitation rights are usually granted by the court as a matter of course to the non-custodial parent. In fact, access is properly regarded as a right of the child as well as the non-custodial parent. A British Columbia court has held that:

> [A]ccess is more than provision of an opportunity to gratify parental affection for the children; it is also a right of visitation to enable a parent to discharge adequately his remaining duties as guardian of the person and estate of his child. The prerogative of parenthood includes not only the right of access of the parent but also the right of visitation of the child to enable the parent to discharge adequately the remaining duties as the guardian of the person and estate of his child. The preservation of the right of access may be important to the welfare of the child to ensure that it is being properly maintained and cared for by the parent having its custody.[15]

Child care professionals echo similar sentiments:

> Particularly today, both parents often participate to a considerable extent in raising of their children and develop close ties to them at an early age. The detrimental effects of separation through divorce may be significantly minimized if the child is able to maintain a meaningful relationship with both parents. To the child, continued contact with the non-custodial parent may be proof of his continued love.[16]

The question of authority to change a child's name is analogous to access in an important respect: both involve the continuing relationship between the non-custodial parent and the child. It is not suggested that changing a child's name will always jeopardize the relationship. But it is obvious that change of a child's name can affect the parent-child relationship.

[13] See e.g. *Hanlon v. Magl*, [1957] S.C.R. 606, and Law Reform Commission of Saskatchewan, "Proposals on Custody, Parental Guardianship and the Civil Rights of Minors," p. 1-2.

[14] *McKee v. McKee* [1951] 2 D.L.R. 657 (P.C.).

[15] S.S. 1978, c. 28, see now R.S.S. 1978, c. 32 (Supp.), s. 3.

[16] E.g. see the discussion in Goldstein, Freud and Solnit, New York [1973], *Beyond the Best Interests of the Child.*

A clear case of an objectionable name change might be one in which it is apparent that the name change is part of an attempt by the custodial parent to cut ties between the child and the other parent. In any case, a decision to change a child's name requires weighing a range of factors. Unless the parents can agree, the change should not be a simple administrative act which can be initiated unilaterally by the custodial parent.

The law in other jurisdictions is closer to this point of view than the law in Saskatchewan. In England, the welfare of the child is recognized as the principal concern when a child's name is changed without consent of both parents. In *W. v. A.*, for example, the court held that the basic issue was the child's welfare and identified maintenance of links with the paternal (non-custodial) family as an important element in determining where the child's welfare lies.[19]

In Canada, Alberta alone explicitly provides that consent of a parent to a name change of a minor can be dispensed with only "having regard to the best interests of the child."[20] Most other jurisdictions enumerate a list of factors to be considered in an application to dispense with consent, for example, Ontario's list includes "the ties between the child and the parent whose consent is to be dispensed with and the ties between the child and other members of the family of which the child has been a member."[21] A Nova Scotia case, *R.M. v. R.E.S.*, which adopts a welfare test, is also a good example of the factors which a court applying that test should consider in an application to dispense with consent.

In that case, the father had not deserted the child, or failed to provide for it, and noted the "close parental relationship and obvious love for the child" he exhibited. Consent was not dispensed with. The trial judge noted that the father had not deserted the child, or failed to provide for it, and noted the "close parental relationship and obvious love for the child" he exhibited. Consent was not dispensed with. The decision was upheld on appeal. The Appeal Court concluded that:

> In our opinion there was evidence upon which the trial judge could have reached these conclusions, for example, the close relationship between father and son, the fact that the boy knew his surname and

It is important to note that the decision does not rest on any notion that the father's surname is more natural and appropriate than the mother's chosen name.[22]

[19] [1981] 1 All E.R. 100. See also *Re H. O.* (1976) 6 Fam. Law 210.

[20] The *Change of Name Act*, R.S.A. 1980, c. C-4.

[21] The *Change of Name Act*, R.S.O. 1980, c. 62, 9(3). Provisions of most other provinces are almost identical, except P.E.I., which provides no criteria for dispensing with consent, and B.C. which allows consent to be dispensed with where "the change of name will not unduly prejudice the person whose consent is being dispensed with".

[22] [1981], 29 O.R. (2d) 507.

[23] [1979], 2 Family Law Review 140, at 140 (N.S.S.C.).

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The focus is, rather, on the significance of change in an established name, and the consequences which that might have for the child's self-image and relationship with the absent parent who bears the established name. Cases in which a name change is sought usually involve a reversion to a maiden name or the taking of a new married name by the mother. The same issues would arise, however, if a custodial father sought to change his name and impose the change on his child.

IV. PROPOSALS FOR REFORM

Section 6 of *The Change of Name Act* presently provides, in part:

6.(1) Where a person mentioned in subsection 4(1) is the parent of an unmarried infant child of whom he has lawful custody and where that child has a surname other than his surname, the person may apply for the surname of the child to be changed to his surname.

(2) Where a married person makes an application under subsection (1), the application shall be accompanied by the consent of his spouse.

It is recommended that such a change of name of a child should not ordinarily occur without parental consent. Therefore, subsection 6(2) of the *The Change of Name Act* should be amended to provide:

6(2) Where an application is made under subsection (1), the application shall be accompanied by the consent of the other parent if the other parent is the spouse or former spouse of the applicant, or the child has the same name as the other parent.

The proposed amendment will not require the consent of the putative father of a child born out of wedlock except in the exceptional case when the child has already taken the father's name. A child born out of wedlock who has its mother's name will ordinarily suffer no loss of identification with the father if its name is subsequently changed.

Section 6.1 of the Act provides for court orders dispensing with consent under both sections 5 and 6. It would be appropriate to apply the direction to consider the child's interests in all cases in which a child's name may be changed. Section 6.1 provides that:

Where an applicant is unable to obtain the consents required in section 5 or 6, he may apply to a judge of Her Majesty's Court of Queen's Bench for Saskatchewan or to a judge of the Provincial Court of Saskatchewan and the judge may, in his discretion, grant an order, dispensing with the consent, which order is to be forwarded to the director with the application for a change of name.

It is recommended that a subsection be added to section 6.1, providing that:

The court shall not dispense with a consent required in section 5 or 6 where an application has been made to change the name of an unmarried infant child unless it is in the interests of the child to do so.

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